IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

SENTINEL TRUST COMPANY, DANNY N. BATES, CLIFTON T. BATES, HOWARD H. COCHRAN, BRADLEY S. LANCASTER, and GARY L. O'BRIEN,	)	
Plaintiffs,	)	
v.	)	USDC No. 3:04-0836
KEVIN P. LAVENDER, Commissioner of the Tennessee Department of Financial Institutions,	)	Judge Nixon
Defendant.	)	

DEFENDANT'S RESPONSE TO REQUEST FOR INJUNCTIVE RELIEF

Defendant Kevin P. Lavender, Commissioner of the Tennessee Department of Financial Institutions, hereby submits this Response in opposition to Plaintiff's request for a Temporary Restraining Order and a Preliminary Injunction, pursuant to Fed.R.Civ.P. 65.

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster and Gary L. O'Brien are all either former directors, officers and/or shareholders of Sentinel Trust

Company, a state-chartered trust company located in Hohenwald, Lewis County, Tennessee.[1] Defendant, Kevin P. Lavender, is the duly appointed Commissioner of the Tennessee Department of Financial Institutions, and is charged with enforcing and administering the provisions of chapters 1 and 2 of Title 45 of the Tennessee Code Annotated.[2] As a state-chartered trust company, Sentinel is engaged in fiduciary activities and subject to regulation by the Commissioner under the Tennessee Banking Act pursuant to Tenn. Code Ann. § 45-1-124.

On March 19, 2004, the Department was provided with a copy of an audit report for Sentinel issued by Kraft Bros.[3] In that report, Kraft identified approximately $9.4 million in fiduciary account receivables, of which approximately $7.5 million resulted from expenditures Sentinel had made in connection with defaulted bond issues and related unreimbursed costs and expenses. Kraft also stated in the report that the company's records had been inadequate for them to satisfy themselves as to the existence, amount or collectability of those receivables and,

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[1]Petitioners have filed their Petition for Writ of Certiorari in the name of Sentinel Trust Company and in their individual names. The Commissioner objects to any such petition being brought in the name of or on behalf of Sentinel. Tenn. Code Ann. § 45-2-1502(b)(2) provides that once the Commissioner has taken possession, "the ***commissioner shall be vested with the full and exclusive power of management and control***, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, ***to commence, defend and conduct in its name any action or proceeding in which it may be a party*** . . . . (Emphasis added). Unless and until the Commissioner is ordered to return possession of Sentinel to Petitioners, he is vested with the "full and exclusive power of management and control" of Sentinel, including the commencing of any legal action in the name of Sentinel. *See also, First Savings & Loan Association v. First Federal Savings & Loan Association,* 531 F.Supp. 251, 255 (D. Hawaii 1981)("When a receiver is appointed for a corporation, the corporation's management loses the power to run its affairs and the receiver obtains all of the corporation's powers and assets."). Accordingly, the Commissioner submits that the Petition for Writ of Certiorari may only be brought in the name of the former officers, directors and/or shareholders of Sentinel.

[2]Tenn. Code Ann. § 45-1-104.

[3]R. Vol. I, 169-178.

due to the materiality of this issue, Kraft declined to give an opinion as to the financial status of Sentinel as of December 31, 2002.[4] Kraft also noted in its letter to management that:

> (1) Trust Department and Company cash had been commingled in the same bank account;
> (2) the Company appeared to have paid company expenses from Trust Department accounts and reimbursed the Trust Department at a later date; and,
> (3) the Company had not been preparing an accurate reconciliation of the bank balance to the general ledger on a monthly basis, but was simply adjusting the general ledger balance to the bank's monthly balance which resulted in the company and the Trust Department significantly overstating cash as of December 31, 2002.[5]

After receiving this audit report, Department examiners went to Sentinel on March 22, 2004, to review additional records and information.[6] Based upon the records provided at this visitation, the Department determined that Sentinel had a net cash shortage in its pooled fiduciary account of $5,789,011.[7]

This shortage resulted from Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues. This practice, as understood by the Commissioner and admitted by Sentinel's management, was as follows: Sentinel served as the indenture trustee for various high-yield, unregistered municipal and corporate bonds. In a number of instances, the debtor had failed to make the scheduled principal and/or interest payments and the bond had been declared in default per the terms of the indenture. Sentinel, in its role as indenture trustee, would

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[4] *Id.*

[5] R. Vol. I, 169-170.

[6] R. Vol. I, 201.

[7] *Id.*

then fund various expenses relative to these defaulted issues, such as insurance, security, legal and other professional fees, in an effort to protect the value of the underlying collateral. While the governing indenture and/or bondholder indemnification usually provided for the reimbursement of these expenses from the proceeds from the sale of the collateral, Sentinel did not have adequate corporate liquidity to fund these expenses, in the event that the defaulted issue did not already have sufficient funds on deposit with Sentinel. Thus, in order to fund these expenses, Sentinel would "borrow" from other non-related bond issues by writing checks and/or wires on its pooled demand deposit account at SunTrust Bank (hereinafter referred to as the "pooled fiduciary account").[8]

On April 1, 2004, the Department examiners met with Plaintiff Danny Bates, President of Sentinel, and an auditor from Kraft.[9] Prior to that meeting, President Bates had been provided with the Department's determination of a net cash shortage of $5,789,011. During the meeting, President Bates was specifically asked if the Department's analysis and resulting determination of an approximately $5.7 million shortfall was incorrect. President Bates did not deny the accuracy of either, but instead, admitted this figure was close to the correct amount of the shortfall.[10]

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[8]Additionally, as noted by Kraft Bros. in its audit report, Sentinel's management used funds from the pooled fiduciary account to pay corporate and personal expenses.

[9]*See* Affidavit of Wade McCullough attached as Exhibit 1 to Response to Petition for Writ of Certiorari and Writ of Supersedeas. *See also*, R. Vol. I, 202-203.

[10]*See* Affidavit of Wade McCullough.

Subsequently, on April 28, 2004, the Commissioner and members of his staff met with Sentinel's Executive Vice-President, Paul Williams, and Sentinel's attorney.[11] In that meeting, Sentinel's counsel indicated that Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues was "inappropriate" and that such expenses were typically funded with corporate assets.[12]

On April 30, 2004, the Commissioner and his staff met with the board of Sentinel and its legal counsel. At that meeting, President Danny Bates admitted that his most recent calculations showed that Sentinel had a deficit fiduciary cash position of approximately $7.25 million, but that this figure fluctuated daily.[13] As a result of President Bates' admissions, on May 3, 2004, the Commissioner issued an Emergency Cease and Desist Order and Notice of Charges against Sentinel, pursuant to Tenn. Code Ann. §§ 45-1-107(a)(4), (5) and (c).[14] The Order and Notice declared that the Commissioner had determined that Sentinel was operating in an unsafe and unsound manner and ordered Sentinel, among other things, to make an initial infusion of capital in the amount of $2 million by the close of business on May 17, 2004, to partially replenish the fiduciary cash deficiency. The order further directed Sentinel to submit a capital plan outlining the Company's plans to completely replenish the fiduciary pooled account and to outline the steps to be taken to provide sufficient operating capital.[15]

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[11]R. Vol. II, 310, 316, 323.

[12]R. Vol. II, 316, 323.

[13]R. Vol. I, 203; Vol. II, 317, 323.

[14]R. Vol. II, 311-337.

[15]*Id.*

On May 17, 2004, the Commissioner and his staff met with Sentinel's new legal counsel.[16] At that meeting, Sentinel's counsel admitted that Sentinel had not provided the Commissioner with a capital plan,[17] because they did not have a "good enough handle on the financial situation."[18] In addition, counsel also indicated that Sentinel's management was only willing to make a total capital infusion of $225,000, instead of the $2 million directed by the Commissioner.[19]

In light of Sentinel's failure to comply with the primary directives of the Order and Notice, and in light of the record as a whole, the Commissioner determined that the only appropriate action necessary to protect the bond issuers and bondholders was to take immediate possession of Sentinel. Accordingly, on May 18, 2004, the Commissioner took emergency possession of Sentinel pursuant to Tenn. Code Ann. §§ 45-2-1502, which provides in part as follows:

> (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
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> (1) Its capital is impaired or it is otherwise in an unsound condition;
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> (2) Its business is being conducted in an unlawful or unsound manner;
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> (3) It is unable to continue normal operations; or
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> (4) Its examination has been obstructed or impeded.
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> * * *

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[16]Sentinel's previous counsel had withdrawn from representation due to President Bates' refusal to resign.

[17]Sentinel had submitted a Capital Adequacy Plan to the Department on May 3, 2004, but withdrew it that same day. *See* R. Vol. I, 204; R. Vol. II, 339-342.

[18]R. Vol. III, 453-455.

[19]*Id.*

> (c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commission may have a review by certiorari as provided in title 27, chapter 9.[20]

That same day, the Commissioner issued an order appointing Receivership Management, Inc., to act as the Receiver of Sentinel, pursuant to Tenn. Code Ann. § 45-2-1502(b)(2).[21]

Upon taking possession, the Receiver and Department personnel immediately began reviewing and analyzing Sentinel's books and records in an attempt to determine the true financial status of the company, including the extent of the shortfall in the pooled fiduciary account, as of the date of possession (May 18, 2004). This determination was hampered by the fact that Sentinel was using two different accounting systems — Quick Books and AccuTrust fiduciary accounting system — and that entries in these two systems were not consistently reconciled with each other or with the SunTrust bank statements on the pooled fiduciary account.[22]

On June 15, 2004, the Receiver and Department personnel issued a preliminary report ("the Report") on the fiduciary and corporate financial positions of Sentinel, based upon a review of Sentinel's own records.[23] Those records reflected, as set forth in the Report, that as of December 31, 2003, Sentinel had a cash deficiency or shortfall in the pooled fiduciary account of

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[20]As required by Tenn. Code Ann. § 45-2-1502(b)(1), this Notice was filed with the Lewis County Chancery Court and was posted upon the doors of Sentinel Trust Company. In addition, a copy of the Notice was personally hand-delivered to the President of Sentinel Trust Company.

[21]R. Vol. III, 466-476.

[22]R. Vol. III, 603.

[23]R. Vol. III, 623-41.

$5,789,011.00. That cash deficiency in the pooled fiduciary account increased over the next four months such that by May 18, 2004, the deficiency ranged from $7,612,218.00 in Quick Books to $8,430,722.00 in the AccuTrust fiduciary accounting system. In addition, the Receiver and Department personnel had discovered bond principal and interest checks in Sentinel's vault totaling $861,107.11 that had not been sent to bondholders.[24] Thus, Sentinel's cash deficiency in the pooled fiduciary account should actually be increased by the amount of these checks such that the cash deficiency ranges from between $7,913,451.11 to $8,731,956.11.

The report also reflected, based upon Sentinel's own records, that for the first four and a half months of 2004, Sentinel operated with a net loss of $197,917.00.[25] Finally, the report showed that as of May 18, 2004, Sentinel had total corporate assets of $1,389,682. Thus, taking into account the cash deficiency in the pooled fiduciary account (which is reflected as an accounts payable), the report determined that Sentinel was insolvent in an amount of at least $6,225,445 as of May 18, 2004.[26]

On June 17, 2004, the Commissioner and members of his staff met with Petitioner Danny Bates, and his attorney, Carroll Kilgore.[27] At that meeting, Mssrs. Bates and Kilgore were presented with a copy of the Report for their review and given the opportunity to discuss the

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[24] *Id.* Since the issuance of the report on June 15, 2004, the Receiver and Department staff have found additional principal and interest checks increasing the total amount to $861,107.11. To date, demands totaling $105,000 for bond principal checks have been received. *See* Affidavit of Wade McCullough, Exhibit 1.

[25] R. Vol. III, 634.

[26] R. Vol. III, 633. This insolvency does not include the $861,107.11 in bond principal and interest checks discussed, *supra*, which increases the fiduciary cash deficiency, and would increase the insolvency by a corresponding amount.

[27] R. Vol. III, 601.

Report with the Commissioner and his staff. Mssrs. Bates and Kilgore were also given the opportunity to submit a written response to the Report prior to the Report being made public and/or any action taken by the Commissioner with respect to the Report. Neither Mr. Bates nor Mr. Kilgore had any substantive comments to make with respect to the Report during the meeting with the Commissioner, nor did they submit any written response.[28]

In light of the Report's determination that Sentinel was insolvent in an amount of at least $6,225,000; that Sentinel did not have sufficient liquid assets to pay off its bondholders and creditors; did not have a viable plan for the infusion of sufficient capital to eliminate the $7.6-$8.4 million cash deficiency in the pooled fiduciary account; and the record as a whole, the Commissioner determined that liquidation of Sentinel in accordance with the provisions of Tenn. Code Ann. §§ 45-2-1502(c)(2) and 1504 was necessary and appropriate.[29] Accordingly, on June 18, 2004, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company.[30]

Although they had been informed of their rights to seek judicial review in the Notice of Possession that was personally delivered to them on May 18, 2004, Plaintiffs did not actually pursue such review of the Commissioner's decisions to take possession and to liquidate Sentinel until June 29, 2004, when they filed a Petition for Writ of Supersedeas and for Common-Law Writ of Certiorari with the Davidson County Chancery Court (*Sentinel Trust Company, et al. v. Kevin P. Lavender*, Davidson County Chancery Court No. 04-1934-I). The Petition rested primarily upon a legal argument, *i.e.*, that since "no statute provides that the term "bank"

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[28] *Id.*

[29] R. Vol. III, 644-646.

[30] *Id.*

includes "trust company" with reference to any other provisions of the Tennessee Banking Act", the Commissioner had no authority to exercise any of his "bank regulatory powers" against Sentinel, a non-banking trust company, including Tenn. Code Ann. § 45-2-1502, which authorizes the Commissioner to take possession of a state bank in certain circumstances.[31] Instead, the Plaintiffs asserted that the Commissioner only has

> the general power to enforce applicable laws against trust companies, including both statutes applicable by their terms only to trust companies (*supra*, ¶ 7), and statutes in the Tennessee Banking Act concerning fiduciary functions which, by their explicit terms, are applicable both to trust companies and to banks authorized to exercise fiduciary powers, T.C.A. §§ 45-2-1002-1006.[32]

The Plaintiffs also raised several arguments with respect to the constitutionality of Tenn. Code Ann. § 45-2-1502.

On July 27, 2004, the Commissioner filed a Response in Opposition to the Petition for Writ of Certiorari and Supersedeas, along with the administrative record considered by the Commissioner in making the decision to take possession and to liquidate Sentinel.[33] In his response, the Commissioner asserted that he had acted with express statutory authority in taking possession and determining to liquidate Sentinel Trust Company, pursuant to Public Chapter 112, Acts of 1999, codified at Tenn. Code Ann. § 45-1-124. The Commissioner further asserted that the statutes authorizing him to take possession were constitutional. Finally, the Commissioner asserted that there was substantial and material evidence in the record to support both his decision to take possession and to liquidate Sentinel.

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[31]Petition at ¶ 9.

[32]*Id.*

[33]A copy of this Response is included in the accompanying Appendix.

Subsequently, on July 16, Plaintiffs filed a motion for an expedited hearing on their Petition for Writ of Supersedeas. On August 4, 2004, the Commissioner filed a supplemental response to the Petition for Writ of Supersedeas, which included a transcript of the legislative debates on Public Chapter 112. These debates clearly demonstrated the Legislature's understanding and intent that all the provisions of the Tennessee Banking Act (chapters 1 and 2 of Title 45) would apply to state trust companies.[34]

A hearing on the Petition for Writ of Supersedeas was held on August 5, 2004. Prior to that hearing, the trial court offered to consolidate the hearing on the request for supersedeas with review by common-law writ of certiorari and schedule such hearing it within 7-10 days, ***so that all issues before the Court could be timely resolved.*** The Commissioner agreed that a hearing on all the issues was appropriate and was even willing to stay the ongoing liquidation of Sentinel until such hearing.[35] Plaintiffs, however, were not willing to agree to a consolidated hearing on all the legal and factual issues, but instead, insisted upon proceeding solely on their legal argument that the Commissioner was acting without statutory authority.

On August 9, 2004, the court issued a memorandum and order denying the Petition for Writ of Supersedeas. In doing so, the court first noted that "the lawyer for the petitioners has chosen the battleground. He has chosen to not yet enter the factual fray but has chosen the law as his weapon."[36] The court then went on to find that the "Tennessee banking laws contained in Chapters 1 and 2 of Title 45 fully apply to trust companies and that these statutes are

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[34]A copy of this Supplement Response is included in the accompanying Appendix.

[35]*See* August 9, 2004 Memorandum and Order, fn. 2.

[36]*Id.* at p. 7.

constitutional."[37] As such, the Court found that the Commissioner had acted with express statutory authority in taking possession and determining to liquidate Sentinel Trust Company.[38] The Court further found that the statutory provision in question (Tenn. Code Ann. § 45-2-1502) was constitutional. The Court did not, however, make an opinion as to the factual foundation supporting the decisions to take possession and liquidate, as such issues had not been presented to the Court.[39]

On August 13, 2004, Plaintiffs filed a motion with the trial court requesting that the court: (1) vacate or revise its August 9th order; (2) enter final judgment for Plaintiffs upon both the writs of certiorari and supersedeas on the basis of the pleadings; (3) reserve to Plaintiffs the right to an evidentiary hearing; and, (4) grant an immediate interlocutory appeal in the event this Court declines to vacate or revise its previous order. Plaintiffs also requested an expedited hearing on this motion. On August 17, 2004, the trial court issued an order directing the Commissioner to file a response to the motion within seventy-two (72) hours. This response was filed by the Commissioner on August 20, 2004.[40]

On August 23, 2004, the trial court issued an Order denying the motion, adhering to its decision and reasoning set forth in its August 9 Memorandum and Order. The court did, however, grant Plaintiffs permission to seek an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. On August 27, 2004, Plaintiffs filed an Interlocutory

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[37] *Id.* at p. 12.

[38] *Id.* at p. 10.

[39] *Id.* at p. 12.

[40] A copy of this Response is included in the accompanying Appendix.

Application for Permission to Appeal and Application for Extraordinary Appeal pursuant to Tenn.R.App.P. 9 and 10.

Before the time had run for the Commissioner to respond to these Applications, the Tennessee Court of Appeals issued an order on September 1, 2004, dismissing them.[41] In that Order, the Court stated as follows:

> Having reviewed the application and supporting documents, we cannot conclude that an interlocutory appeal is necessary to prevent irreparable harm or to prevent needless, expensive and protracted litigation. Nor can we conclude that the trial court has so far departed from the acceptable and usual course of judicial proceedings as to require immediate review under Tenn.R.App.P. 10.[42]

Although the Commissioner's response to the Plaintiffs' Petition for Writ of Certiorari and the administrative record have been filed since July 27, 2004, to date, Plaintiffs have made no attempt to pursue any further hearing on their Petition in Davidson County Chancery Court. Instead, Plaintiffs have now filed this suit in federal court pursuant to 42 U.S.C. § 1983, seeking injunctive relief. The legal grounds asserted for such relief, however, are the same grounds that were fully briefed and argued before the Davidson County Chancery Court and rejected. Further, the Tennessee appellate courts have declined to authorize interlocutory or extraordinary review of that ruling. Obviously dissatisfied with these rulings, and apparently unwilling to further pursue their remedy in state court, Plaintiffs are now trying using the federal courts to hopefully achieve a more satisfactory ruling. Plaintiffs' legal argument is entirely without merit. Moreover, Plaintiffs have utterly failed to present any basis for why this Court should ignore the

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[41] A copy of this Order is included in the accompanying Appendix.

[42] *Id.*

fundamental concepts of federalism and enjoin the ongoing regulatory activities of the Commissioner, particularly where Plaintiffs have failed to further pursue their available state remedies. As such, Plaintiffs' request for injunctive relief should be denied in its entirety.

II. CRITERIA FOR ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs have filed this suit against the Commissioner of the Tennessee Department of Financial Institutions, alleging that he acted without statutory authority in taking possession and deciding to liquidate Sentinel Trust Company, thereby depriving Plaintiffs of their rights to due process of law under the Fourteenth Amendment of the U.S. Constitution in violation of 42 U.S.C. § 1983. Plaintiff seeks preliminary injunctive relief restraining the Commissioner from taking any further steps to carry out the liquidation of Sentinel Trust Company and permanent injunctive relief mandatorily directing the Commissioner to restore full control of Sentinel to Plaintiffs.[43]

Fed. R. Civ. P. 65 provides that a preliminary injunction may be granted if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that acts or omissions of the adverse party will tend to render such final judgment ineffectual. Although the issuance of a preliminary injunction pursuant to Rule 65 is within the discretion of this Court, it is an extraordinary and

[43]Plaintiffs' Complaint at pp. 17-18. Plaintiffs have also requested, if the Court deems it appropriate, that the final hearing on the merits be consolidated with any preliminary injunction hearing pursuant to Fed.R.Civ.P. 65(a)(2). The Commissioner has no objection to such a consolidation.

drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.[44]

There are four factors a court should consider and weigh in determining whether to grant a request for preliminary injunctive relief:

1. A substantial likelihood of success on the merits;

2. Irreparable and immediate harm;

3. The relative harm that will result to each party as a result of the disposition of the application for injunction; and

4. That the public interest is served by issuance of an injunction.[45]

Injunctive relief is not available unless some real possibility of injury is impending or threatened which can only be averted by protective extraordinary process.[46] Furthermore, injunctions are not awarded in doubtful cases; the court must refuse an application for injunction unless a right is about to be destroyed or there is irreparable injury.[47] As has been stated by the Sixth Circuit

> The classic principles governing availability of injunctions were summarized by Justice Baldwin, sitting at circuit, in 1830: 'There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate

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[44]*See* Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2nd § 2948 at 129-133 (1995).

[45]*Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001)(internal citations omitted).

[46]*See Willett v. Wells*, 469 F.Supp. 748 (E.D.Tenn. 1977), *aff'd* 595 F.2d 1227 (6th Cir. 1979).

[47]*See Roseboro v. Fayetteville City Board of Education*, 491 F.Supp. 110 (E.D.Tenn. 1977)(internal citations omitted).

> or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such act.'[48]

Furthermore, judicial intervention into the activities of state officers discharging in good faith their official duties should be exercised with great restraint.[49] Thus, a preliminary injunction should not issue except under the most compelling and extraordinary circumstances.

As set forth herein, Plaintiffs have failed to carry this heavy burden of persuasion for the imposition of the extraordinary relief of a preliminary injunction and, therefore, Plaintiffs' request should be denied in its entirety.

III. ARGUMENT

A. Likelihood Of Success On The Merits

Plaintiffs cannot demonstrate any likelihood of success on the merits of their argument that Commissioner has violated their due process rights under the Fourteenth amendment. The fundamental basis of Plaintiffs' complaint is their assertion that the Commissioner lacks the

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[48] *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967, 93 S.Ct. 2149, 36 L.Ed.2d 687 (1973)(internal citations omitted). *See also, MLZ, Inc. v. Fourco Glass Co.*, 470 F.Supp. 273, 278 (M.D.Tenn. 1978).

[49] *See Integrity International Security Services, Inc. v. United States Department of the Army*, 870 F.Supp. 787, 789 (E.D.Tenn. 1994) and *Roseboro*, 491 F.Supp. at 113.

necessary authority under state law to take possession and liquidate a state-chartered trust company. Specifically, Plaintiffs argue that Tenn. Code Ann. § 45-2-1502 of the Tennessee Banking Act only authorizes the Commissioner to take possession of and liquidate state banks, not trust companies, because these provisions only speak in terms of "state banks."

Although Plaintiffs have tried to disguise this argument in the garb of a § 1983 cause of action, it is still the same argument that they made in the pending state court proceeding and that was fully rejected by the state trial court. As such, this Court lacks jurisdiction to review this decision under the *Rooker-Feldman* doctrine. This Court further lacks jurisdiction under 42 U.S.C. § 1983, as Plaintiffs have failed to demonstrate that the available state remedies are inadequate to redress their alleged due process violations. Finally, even if this Court does have subject matter jurisdiction, Plaintiffs' argument that the Commissioner acted illegally or in excess of his jurisdiction when he took possession of Sentinel Trust Company, and subsequently determined to liquidate the company is without merit, as it is contrary to the express language of the Tennessee Banking Act and the intent of the Tennessee General Assembly.

1. Rooker-Feldman Doctrine

Under the *Rooker-Feldman* doctrine, federal courts lack jurisdiction to review a case litigated and decided in state courts as only the United States Supreme Court has jurisdiction to correct state court judgments.[50] Such a rule is bolstered by the negative inference drawn from 28 U.S.C. § 1257(a) which states that "[f]inal judgments or decrees rendered by the highest court of

[50]*See District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923); *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 506-07 (6th Cir. 2000).

a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari."

Federal courts also lack jurisdiction to review constitutional claims that are inextricably intertwined with the state court's decision.[51] As Justice Marshall stated:

> While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that ***the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.*** Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.[52]

Thus, under the *Rooker-Feldman* doctrine, a party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States.[53]

Here, a fair reading of Plaintiffs' complaint reveals that they are essentially appealing in federal court the decision of the Davidson County Circuit Court (sitting by interchange) that the Tennessee Legislature intended to make all the provisions of the Tennessee Banking Act, including the power to take possession and to liquidate, applicable to trust companies and, therefore, that the Commissioner acted with express statutory authority in taking possession and liquidating Sentinel Trust Company. Indeed, at their insistence, that was the sole issue presented

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[51] *See Feldman*, 460 U.S. at 486-487; *Patmon*, 224 F.3d at 509-10.

[52] *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)(Marshall, J., concurring)(emphasis added).

[53] *See U.S. v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995)(citations omitted).

and determined by the state court. The state court ruled against the Plaintiffs, and instead of pursuing a final order appealable as of right [54], Plaintiffs are seeking judicial review by this Court of that state court's decision interpreting state law and to have this Court "correct" what they believe to be an erroneous decision. Such review is impermissible under the *Rooker-Feldman* doctrine and, therefore, this Court lacks subject matter jurisdiction over Plaintiffs' claims.

2. Lack of Jurisdiction under 42 U.S.C. § 1983.

The United States Supreme Court has held that where a plaintiff has a remedy under state law against a government official who deprived the plaintiff of property, the plaintiff does not have a claim under the Due Process Clause,[55] even if it were an intentional act to deprive the plaintiff of his property.[56] Accordingly, a plaintiff may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative processes and remedies to redress his or her due process violations.[57]

Tenn. Code Ann. § 45-2-1502(c)(1), which authorizes the Commissioner to take emergency possession of a bank or trust company without a hearing, specifically provides that "any person aggrieved and directly affected by this action of the commission may have a review by certiorari as provided in title 27, chapter 9." Title 27, chapter 9 of Tennessee Code Annotated

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[54]The state trial court noted in its memorandum and order that Plaintiffs had chosen to not yet enter into the "factual fray," but instead, to pursue only its legal argument. To date, Plaintiffs still have not pursued any hearing on their petition for writ of certiorari, which would necessarily require a determine of whether substantial and material evidence exists in the record to support the Commissioner's decision to take possession and to liquidate Sentinel.

[55]*Parratt v. Taylor*, 451 U.S. 527, 543-44, 101 S.Ct. 1980, 68 L.Ed.2d 420 (1981).

[56]*Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 3203-04, 82 L.Ed.2d 393 (1984)(in procedural due process cases claiming deprivation of property interest, plaintiff must attack the state's corrective procedure as well as the substantive wrong).

[57]*Jefferson v. Jefferson County Public School System*, 360 F.3d 583, 588 (6th Cir. 2004)(citations omitted).

contains the procedural provisions for seeking judicial review under either the common law or statutory writ of certiorari. Further, Tenn. Code Ann. § 27-9-106 provides when a writ of supersedeas — the equivalent of a preliminary injunction or stay — may be sought and granted in such cases.

> (a) If the ***order or judgment rendered by such board or commission made the basis of the petition for certiorari shall make any material change in the status of any matter determined therein***, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at the time of filing such petition, for a supersedeas, and the chancellor, in the chancellor's discretion, may grant a ***writ of supersedeas to stay the putting into effect of such order or judgment or any part thereof.***

Here, Plaintiffs do not plead, much less allege any evidence demonstrating that these remedies are inadequate.[58] Indeed, essentially the only complaint Plaintiffs have asserted with respect to these remedies is that the state trial ruled against them on their legal argument that the Commissioner acted without statutory authority. As already discussed, Plaintiffs have completely failed to pursue any hearing on the merits of their petition for writ of certiorari, even though the Commissioner has requested such a hearing since the end of July, 2004. Plaintiffs'

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[58]In addition to the pending proceeding in state court on Plaintiffs' Petition for Writ of Certiorari, Plaintiffs also have an administrative proceeding pending. As discussed, *supra*, on May 3, 2004, the Commissioner issued a Notice of Hearing and Charges and Emergency Cease and Desist Order against Sentinel Trust Company. The Notice informed Sentinel that it was entitled to request a contested case hearing pursuant to Tennessee's Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-301, *et seq.* On June 2, 2004, counsel for Plaintiffs filed an Answer to the Notice and a request for a hearing. The Answer asserted the same argument, *i.e.*, that the Commissioner lacked statutory authority to take possession of Sentinel because the statute authorizing the Commissioner to take possession only speaks in terms of a state bank and not a trust company. Sentinel's request for a hearing was immediately filed with the Administrative Procedures Division of the Tennessee Secretary of State's Office and an Administrative Law Judge ("ALJ") was assigned to hear the case. Plaintiffs have made no further attempt, however, to pursue any hearing before the ALJ.

failure to pursue this remedy renders it impossible for Plaintiffs to challenge its adequacy or inadequacy.[59]

Accordingly, Plaintiffs have failed to state a claim under 42 U.S.C. § 1983 for due process deprivation under the Fourteenth Amendment and, therefore, this Court lacks subject matter jurisdiction over Plaintiffs' complaint.

3. The Commissioner Acted With Express Statutory Authority.

Even if this Court has subject matter jurisdiction, Plaintiffs cannot demonstrate a likelihood of success on the merits of their argument that the Commissioner acted without statutory authority in taking possession and liquidating Sentinel Trust Company.[60] Plaintiffs' argument is entirely disingenuous and ignores the clearly expressed intent of the Tennessee General Assembly that trust companies be fully regulated by the Commissioner and subject to ***all*** the requirements of the Tennessee Banking Act, codified in chapters 1 and 2 of Title 45 of the Tennessee Code, including the power to seize and liquidate.

The Tennessee Banking Act was first adopted by the General Assembly in 1969 and only directed that all state banks be operated in accordance with its provisions.[61] In 1980, the General Assembly amended the Act to expand the scope of its application, providing as follows:

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[59] *See McLaughlin v. Weathers*, 170 F.3d 577, 580 (6th Cir. 1999).

[60] While Plaintiffs have made a number of unsupported factual allegations in their Application concerning the solvency or insolvency of Sentinel, that issue is not really before this Court. Indeed, to date, Plaintiffs have steadfastly refused to pursue a hearing on the issue of whether there is substantial and material evidence in the record to support the Commissioner's decision to take possession and liquidate Sentinel. In any event, it is clearly an issue that should be heard and determined in the first instance by the state trial court.

[61] *See* Public Acts 1969, Chap. 36, § 1.104 (copy attached to Response to Petition for Writ of Certiorari and Writ of Supersedeas, Appendix).

> provided, however, a state bank or trust company whose purposes and powers are limited to fiduciary purposes and powers shall be subject only to the provisions pertaining to fiduciaries in Chapters 1 through 11 of this title and ***such other provisions of said chapters as the Commissioner determines are reasonably necessary for the sound operation of such banks or trust companies.***[62] (Emphasis added).

The General Assembly further provided that "[n]o trust company hereafter may be incorporated or be qualified to act as a fiduciary unless it is incorporated under Chapters 1 through 11 of this title, or the laws governing national banking associations."[63]

Had the Banking Act remained unchanged since the adoption of Chapter 620 in 1980, Petitioners' assertion that the Commissioner only has the power to enforce against trust companies statutes in the Tennessee Banking Act concerning fiduciary functions might have some validity. However, the Banking Act did not remain unchanged. In 1999, the General Assembly amended the Act to specifically make trust companies subject to all of its provisions, and not just those pertaining to fiduciaries. Section 3 of Chapter 112 of the Public Acts of 1999 amended Tenn. Code Ann. § 45-1-124(b) by deleting that subsection and substituting the following:

> (b) To the full extent consistent with such rights, liabilities and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and Chapter 2 of this title. ***Unless the Commissioner determines otherwise, the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall also apply to the operation and regulation of state trust companies and banks whose purposes***

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[62] *See* Public Acts 1980, Chap. 620, § 3 (copy attached to Response to Petition for Writ of Certiorari and Writ of Supersedeas, Appendix), codified at Tenn. Code Ann. § 45-1-124.

[63] *Id.* at § 4.

and powers are limited to fiduciary purposes and powers. (Emphasis added).

Section 4 of Chapter 112 further amended Tenn. Code Ann. § 45-1-124 to add the following new subsection:

> ( ) The charter of a trust company granted by the commissioner shall not be void due to the enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the commissioner, on July 1, 1999.
>
> ( ) Companies engaged in activities subject to Title 45, Chapters 1 and 2, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Chapter 620 of the Public Acts of 1980 and not previously subject to regulation by the commissioner may continue to act as a fiduciary without submitting an application. ***However, such entities shall otherwise be fully subject to Chapters 1 and 2.***
>
> ( ) Companies authorized by their charter, prior to the enactment of Chapter 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, then must file the appropriate application to establish a trust company and ***then fully comply with Chapters 1 and 2.***
>
> ( ) ***All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of Chapters 1 and 2 and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999.*** During this period of time, to conform to the requirements of Chapters 1 and 2, the commissioner may conduct examinations at such company's expenses, and apply the requirements of Chapters 1 and 2 as deemed appropriate.[64] (Emphasis added).

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[64] *See* Public Acts of 1999, Chap. 112, § 4 (emphasis added) (copy attached to Response to Petition for Writ of Certiorari and Writ of Supersedeas, Appendix).

These provisions of Chapter 112 make it unmistakably clear the General Assembly's intent that ***all*** of Chapters 1 and 2 of Title 45 ***shall*** apply to the operation and regulation of state trust companies, and that such companies shall fully comply and conform with all the provisions of these chapters, and not just the provisions pertaining to fiduciary activities.

The Commissioner took possession of Sentinel pursuant to the provisions of Tenn. Code Ann. § 45-2-1502, which provides in part as follows:

> (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
>
> (1) Its capital is impaired or it is otherwise in an unsound condition;
>
> (2) Its business is being conducted in an unlawful or unsound manner;
>
> (3) It is unable to continue normal operations; or
>
> (4) Its examination has been obstructed or impeded.
>
> * * *
>
> (c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commission may have a review by certiorari as provided in title 27, chapter 9.

Petitioners argue, however, that because this statute speaks only in terms of a state bank and its depositors, and since Sentinel is neither a state bank nor does it have any deposits/depositors, this statute does not apply to Sentinel and, therefore, the Commissioner acted illegally or exceeded his authority when he took possession of Sentinel pursuant to this statute. This argument is directly contrary to the most fundamental rule of statutory construction

and that is that ***the intention of the legislature must prevail.***[65] Under this rule, courts must ascertain and then give the fullest possible effect to the General Assembly's purpose in enacting a statute as reflected in the statute's language.[66] Furthermore, the Tennessee Supreme Court has held that where the language of a statute is clear and unambiguous, the courts must interpret the statute as written,[67] rather than using the tools of construction to give the statute another meaning.[68] Here, the language of Tenn. Code Ann. § 45-2-124 clearly and unambiguously reflects the Legislature's intent that ***all provisions of chapters 1 and 2 of the Banking Act apply to the operation and regulation of trust companies in this state.*** Tenn. Code Ann. § 45-2-1502 clearly is a provision contained within Chapter 2 of Title 45 and, therefore, applies to the operation and regulation of Sentinel Trust Company.

Furthermore, while the Commissioner believes that the language of Tenn. Code Ann. § 45-2-124 is plain and unambiguous and clearly expresses the Legislature's intent that all the provisions of the Banking Act apply to trust companies, to the extent that it's interplay with the provisions of Tenn. Code Ann. § 45-2-1502 creates any ambiguity, then it is appropriate to consider, among other things the legislative history of Tenn. Code Ann. § 45-2-124 (Chapter 112 of the Public Acts of 1999). Here, the legislative history reveals that both the Legislature

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[65] *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn.Ct.App.), *p.t.a. denied* (2002)("The rule of statutory construction to which all others must yield is that the intention of the legislature must prevail."). *See also, Southern v. Beeler*, 183 Tenn. 272, 195 S.W.2d 857 (1946); *Mangrum v. Owens*, 917 S.W.2d 244, 246 (Tenn.Ct.App. 1995); *City of Humboldt v. Morris*, 579 S.W.2d 860, 863 (Tenn.Ct.App. 1978).

[66] *Jones v. Garrett*, 92 S.W.3d 835, 839 (Tenn. 2002); *Robinson v. LeCorps*, 83 S.W.3d 718, 722 (Tenn. 2002).

[67] *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001); *ATS Southeast, Inc., v. Carrier Corp.*, 18 S.W.3d 626, 629-30 (Tenn. 2000); *Lavin v. Jordon*, 16 S.W.3d 362, 365 (Tenn. 2000).

[68] *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001); *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000).

understand and intended that one of the purposes of the act was to clarify what trust companies would be subject to the banking act and the control of the Commissioner.[69]

The legislative history further reveals that Public Chapter 112 was the result of a task force created by the Department of Financial Institutions in 1998 to consider new legislation to regulate trust companies.[70] This task force assisted the Department in drafting the proposed legislation, which was subsequently enacted as Public Chapter 112. Furthermore, in presenting the proposed legislation to both the Administration and the Legislative sponsors, the Department provided certain relevant information, including: (1) a section by section summary of the bill; (2) a report of anecdotal information; and (3) background information.[71]

The section by section summary states that Section 3 of the bill

> provides that the Banking Act shall apply to the regulation of trust companies, except to the extent that the Commissioner determines otherwise. ***This is a fundamental provision of this bill as it has not always been clear in the past what law governs the regulation and operation of trust companies.***[72] (Emphasis added).

The summary further states that Section 4 of the bill establishes how the Banking Act applies to trust companies currently subject to the Department's regulation and to grandfathered trust

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[69]Transcripts of the House and Senate Proceedings are attached to the Supplemental Response to the Petition for Writ of Supersedeas (Appendix).

[70]*See* Affidavit of Greg Gonzales attached hereto as Exhibit 1 to Response to Motion for Rehearing included in the accompanying Appendix.

[71]*Id.*

[72]*See* Exhibit A to Affidavit of Greg Gonzales.

companies and specifically states that "[a]ll trust companies operating on July 1, 1999 shall have up to 3 years from July 1, 1999 to conform to the Banking Act."[73]

The anecdotal information report provided to the Administration and Legislative Sponsors first notes that with the passage of this proposed legislation, consumers "[w]ould be assured that trust companies offering fiduciary services in Tennessee will have some level of supervision." More importantly, this report goes on to note that the Department has identified three (3) pre-1980 trust companies that currently are not regulated by the Department pursuant to a grandfather clause and that the Department has informed these trust companies of what the proposed bill entails. Sentinel Trust Company was one of these three trust companies.[74] With respect to these three companies, the report specifically states:

> Such companies, if determined to be acting as a fiduciary, will have 3 years from the effective date of this bill to conform to these new requirements. This will put all trust companies on a level playing field and will allow the Department to address citizen concerns on all trust companies regardless of when they were formed. Closing the pre-10980 loophole will also help prevent pre-1980 out of state trust companies from trying to claim that they should also not be subject to the Department's review should they seek to establish a presence in Tennessee.[75]

Finally, the background information presented by the Department to the Administration and Legislative Sponsors specifically addresses these pre-1980 trust companies and the Department's concern that they were currently not regulated.

> ***From the Department's experience, it also was deemed important to clarify what fiduciary activities and companies should be***

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[73] *Id.*

[74] R. Vol. I, 17, 206.

[75] *See* Exhibit A to Affidavit of Greg Gonzales.

> ***subject to the Banking Act. That is particularly the case for a few trust companies that are not currently regulated due to an interpretation of the Department in the early 1980's.*** As these few companies are apparently otherwise indistinguishable from other regulated trust companies, there should be no reason that they should not be regulated. However, the Department recognizes that an appropriate timeframe must be given such companies to allow them to adjust to regulation and that has been provided for in the legislation.[76] (Emphasis added).

This information identifies the "subject matter [of Tenn. Code Ann. § 45-1-124], the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment"[77] and conclusively establishes the Legislature's intent that ***all*** the provisions of the Banking Act apply to ***all*** trust companies in this state, pursuant to Tenn. Code Ann. § 45-1-124.

Finally, in determining the meaning of a statute, the Tennessee Supreme Court has held that courts should give deference to the interpretation of the statute followed by the administrative agency charged with its enforcement or execution.[78] The Department of Financial Institutions is authorized to "execute all laws relative to persons doing or engaged in a banking or other business as provided in [title 45]."[79] The Department has clearly interpreted Tenn. Code Ann. § 45-2-124 to mean that all the provisions of Chapters 1 and 2 of the Banking Act apply to all trust companies in this state, as the Department itself drafted the proposed legislation.

Moreover, the Department has consistently maintained this position as evidenced in the

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[76] *Id.*

[77] *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn. 1997).

[78] *Consumer Advocate Division. Greer*, 967 S.W.2d 759 (Tenn. 1998); *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997).

[79] Tenn. Code Ann. § 45-1-104.

annual reports filed with the Governor pursuant to Tenn. Code Ann. § 45-1-119(a). The Banking Division section of the 1999 Annual Report states that "[a] major accomplishment for the [Banking] Division was the passage of Public Chapter 112 which amended the Banking Act, Tennessee Code Annotated Title 45, Chapters 1 and 2" and that among other things, this law "brings previously grandfathered trust companies under departmental jurisdiction, ..." The report goes on to state that no new trust companies were chartered in 1999, but "with the passage of Public Chapter 112, which amended the Banking Act, four previously grandfathered trust companies were brought under the Department's jurisdiction. The Division now supervises a total of 14 trust companies."[80]

The Department has continued to report this information concerning state-chartered trust companies in Tennessee, including any changes occurring with respect to trust companies by reason of opening new trust companies, mergers, and dissolutions (voluntary and involuntary) in its annual reports.[81] The Department has also consistently listed Sentinel Trust Company as one of the state-chartered trust companies regulated by the Department.

In summary, when it enacted the amendments to Tenn. Code Ann. § 45-1-124 in 1999, the General Assembly intended to clarify that all state chartered trust companies are subject to ***all*** the provisions of the Banking Act, including the Commissioner's power to take possession and to liquidate. The Department of Financial Institutions has consistently interpreted that statute in a

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[80]A copy of the Banking Division section of the 1999 Annual Report is attached as Exhibit 2 to the Response to Petitioners' Motion for Rehearing, which is included in the accompanying Appendix. A complete copy of the 1999 Annual Report is available on the Tennessee Department of Financial Institutions website.

[81]Copies of the Banking Division section of the 2000 and 2001 Annual Reports are attached as Exhibit 3 and 4, respectively, to the Response to Petitioners' Motion for Rehearing, which is included in the accompanying Appendix. Complete copies of the 2000 and 2001 Annual Reports are available on the Department's website.

similar fashion. Finally, until the Commissioner took possession of Sentinel Trust Company, Petitioners themselves have acted consistently with this interpretation, *e.g.*, sought to amend their corporate charter, pursuant to the provisions of Tenn. Code Ann. § 45-2-218, which only speaks in terms of a state bank[82] and paid without objection the Annual Assessment Fee authorized in Tenn. Code Ann. § 45-1-118(c)(2).[83]

Accordingly, the state trial court's finding that the Commissioner acted with express statutory authority in taking possession of Sentinel Trust Company pursuant to Tenn. Code Ann. § 45-2-1502 is consistent with the clear intent of the Legislature as expressed in the plain language of the statute, as well as its legislative history and the administrative interpretation followed by the Department. As such, even if this Court has jurisdiction, Plaintiffs cannot establish a likelihood of success on the merits of their argument that the Commissioner acted illegally and without statutory authority in taking possession and liquidating Sentinel — which is the entire basis for their request for injunctive relief.

B. Irreparable Harm To The Movant

A specific finding of immediate and irreparable injury to the movant is considered the most important prerequisite that a court must examine and find when ruling upon a motion for

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[82]A copy of this Application and Amended and Restated Charter are attached as Collective Exhibit 2 to the Response to Petition for Writ of Certiorari and Writ of Supersedeas, which is included in the accompanying Appendix. *See also*, R. Vol. 1, 191-192.

[83]*See* Affidavit of Patti Miller attached as Exhibit 5 to the Response to Petitioners' Motion for Rehearing, which is included in the accompanying Appendix.

temporary injunction. In fact, the absence of irreparable injury must end the court's inquiry.[84] Injunctive relief should not issue to address injury which is neither threatened nor imminent by defendants merely to assuage plaintiff's fears that the profitability of its business may be diminished in the future.[85] Generally, courts will not grant temporary injunctions when the alleged harm is purely economic loss. In order to obtain a preliminary injunction, the harm must be irreparable, not merely substantial.[86]

Plaintiffs assert that if their request for injunctive relief is not granted, the company will eventually be destroyed. This assertion is correct. Tenn. Code Ann. § 45-2-1504 sets forth the procedures that the Commissioner is to follow in liquidating a bank or trust company in his possession. That statute contemplates that after all claims have been paid, any assets remaining shall be distributed to the stockholders and that when all assets have been distributed in accordance with chapters 1 and 2 of Title 45, "the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be canceled."[87]

However, it is the Plaintiffs' own unlawful and unsound actions that created this situation. In the state trial court proceeding, Plaintiffs admitted that they used pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, thereby creating a

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[84]*See Los Angeles v. Lyons*, 461 U.S. 95, 111-12, 103 S.Ct. 1660, 1670, 75 L.Ed.2d 675 (1983); *Warner v. Central Trust Co., N.A.*, 715 F.2d 112, 123-24 (6th Cir. 1983); *Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 969 F.2d 437, 444 (6th Cir. 1982).

[85]*See generally Roseboro v. Fayetteville City Board of Education*, 491 F.Supp. 110, 112 (E.D.Tenn. 1977).

[86]*Hodge Business v. U.S.A. Mobile*, 910 F.2d 367, 369 (6th Cir. 1990).

[87]Tenn. Code Ann. § 45-2-1504(i) and (k).

fiduciary cash shortfall that greatly exceeded Sentinel's current operating capital and estimated net worth of $1.3 million. Plaintiffs further admitted that as of April 30, 2004, this deficiency was approximately $7.25 million. Thus, as Plaintiffs' own critical mismanagement resulted in Sentinel's insolvency, necessitating its liquidation by the Commissioner, they should not now be allowed to ground their contention for injunctive relief on their own unlawful actions.[88]

Additionally, Plaintiffs have failed to timely pursue their state remedies. Although they continue to insist that the company is not insolvent[89] and that the fiduciary cash deficiency is not as large as it appears, they have steadfastly refused to pursue any hearing on these issues, instead choosing to pursue only their legal argument. Indeed, as noted by the state trial court, "the lawyer for the petitioners has chosen the battleground. He has chosen to not yet enter the factual fray but has chosen the law as his weapon."[90] As such, Plaintiffs should also not be allowed to ground their contention for injunctive relief on their own litigation tactics.

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[88]*See e.g., Golden Eagle Refining Company, Inc. v. The United States*, 4 Cl.Ct. 613, 621 (1984). In that case, the government had sought to terminate its contract with plaintiff for JP-4 jet fuel and to solicit reprocurement of such fuel from other sources. Plaintiff sought to enjoin such action, asserting that it would suffer irreparable harm as the loss of the contract would essentially put it out of business because the government was the only buyer of such fuel. The court refused to enjoin termination, declaring that by its own actions, the plaintiff had developed its dependency on the contract and should not be allowed to base its claim of irreparable harm on its own imprudent actions.

[89]For example, Plaintiffs have submitted the affidavit of Robert V. Whisenant, a CPA, who "opines" that the company is not insolvent. The credibility of that "opinion" is certainly questionable, given that the only documents and records Mr. Whisenant has reviewed are audit reports of Sentinel for periods ending 1 ½ to 2 ½ years before the Commissioner took possession; the affidavit of Plaintiff Danny Bates, President and Owner of Sentinel; Sentinel's schedule of fees; and, Plaintiffs' Petition for Writ of Certiorari. Noticeably absent from Mr. Whisenant's review are any reports or documents from the Commissioner and his staff, including the June 15, 2004 Report issued by the Receiver and the three volumes of the administrative record considered by the Commissioner in deciding to take possession of Sentinel.

[90]*Id.* at p. 7.

C. Substantial Harm To Others And The Public Interest

Unquestionably, the State of Tennessee has a strong interest in the operation of financial institutions within the State of Tennessee. This is particular true with respect to financial institutions acting as fiduciaries, as these institutions are often entrusted with millions of dollars on behalf of other entities. Indeed, such was the case with Sentinel Trust Company. At the time the Commissioner took possession on May 18, 2004, Sentinel was holding approximately $36 million in fiduciary investment assets. As an essential element to ensuring the safe and sound operation of financial institutions engaged in fiduciary activities, the State must be satisfied of the financial viability of those institutions so that there is reasonable assurance that the fiduciary funds are used solely for the purposes intended as set forth in any Indenture or Trust Agreements. Here, Plaintiffs have admitted they have used the fiduciary funds of non-defaulted bond issues contrary to the Indenture or Trust Agreements and without the bond issuers' knowledge or consent. These actions have resulted in a deficiency in those fiduciary funds of $7.9 - $8.6 million dollars and the subsequent insolvency of Sentinel in at least $6.25 million.

Another essential element to ensuring the financial viability of financial institutions engaged in fiduciary activities is a properly functioning accounting system that fully and accurately reconciles the institution's fiduciary accounts. Here, Plaintiffs have utilized two separate accounting systems and inconsistencies between these two systems have existed from the start. Further, Plaintiffs did not consistently reconcile the accounts in these systems with each other or with the corresponding bank statements. Additionally, it is undisputed that Plaintiffs have never instituted any sort of internal audit function, but instead, have placed the

sole authority for recording and reconciling all fiduciary accounts in the hands of one individual — the President and owner of the company.

A preliminary injunction staying the ongoing liquidation of Sentinel Trust Company will undoubtedly result in harm to the State, the bond issuers and the bondholders. Sentinel's current revenues are not enough to cover the cost of the company's normal operations — as evidenced by the fact that Sentinel was operating at a net loss of over $300,000 as of May 18, 2004. Even the fees that Mr. Bates alleges should have been collected for June, 2004 would have barely been sufficient to cover salaries and benefits for that month.

Moreover, a number of the non-defaulted bond issuers are seeking to transfer their accounts to a new fiduciary, as provided for in their Agreements. Currently pending in the Lewis County Chancery Court are two separate motions seeking to transfer bond issues to new fiduciaries.[91] Regardless of what action the Lewis County Chancery Court takes on these motion, an injunction staying liquidation will not stay the transfer of these accounts or others, as transfer is being sought pursuant to the terms of the Indenture/Escrow Agreements and federal regulations governing United States Treasury, State and Local Government Series (SLGS).

The transfer of these accounts will further reduce the amount of fees to Sentinel, placing the company in an even greater deficit position. Additionally, by allowing such "cherry-picking" of issues, the ability of the Receiver to secure replacement fiduciaries for the remaining bond issues in a manner that is most beneficial to all will be greatly jeopardized.[92]

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[91]Motions have been filed on behalf of Benton County and Grundy County and are currently set to be heard on September 22, 2004.

[92]As discussed in Plaintiffs' complaint, the Receiver has sent out bid packages for the non-defaulted bond issues, in the hopes of ultimately receiving a positive bid that will result in additional funds being available to pursue collection of the defaulted bond issues and ultimately, reduce the amount of the fiduciary cash deficiency.

Any injunction staying the ongoing liquidation will also obviously increase the costs of the receivership itself. This increase in costs has a two-fold effect. First, because those costs are paid out of the company's revenues, which are ever dwindling, it decreases the amount of funds available to pursue collection on the defaulted bond issues. Although Plaintiffs have used the funds of non-defaulted bond issues to pursue collections on non-related defaulted bond issues, the Commissioner simply cannot engage in such actions. Thus the second effect is that there will be significantly less funds to pursue collection on the defaulted bond issues, resulting in greater losses to the non-defaulted bond issues.

Ultimately, the public interest is served by ensuring that the tremendous amount of fiduciary investment assets of all of Sentinel's bond issuers are properly safeguarded and by allowing the Commissioner to expeditiously liquidate Sentinel Trust Company, an insolvent trust company that has clearly engaged in unsafe and unsound practices and that cannot continue its normal operations.

IV. CONCLUSION

For these reasons, the Commissioner submits that Plaintiffs cannot meet their heavy burden of persuasion for the imposition of the extraordinary relief of a preliminary injunction and, therefore, Plaintiffs' request should be denied in its entirety.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter

Due diligence has been done by approximately 5-6 entities and bids are due by noon on September 22, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by first class U.S. Mail, postage prepaid, to: Carroll D. Kilgore, Branstetter, Kilgore, Stranch & Jennings, 227 Second Avenue North, Fourth Floor, Nashville, TN 37201-1631, this 17th day of September, 2004.

JANET M. KLEINFELTER
Senior Counsel

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

SENTINEL TRUST COMPANY, DANNY N. BATES, CLIFTON T. BATES, HOWARD H. COCHRAN, BRADLEY S. LANCASTER, and GARY L. O'BRIEN,	)	
Plaintiffs,	)	
v.	)	USDC No. 3:04-0836
KEVIN P. LAVENDER, Commissioner of the Tennessee Department of Financial Institutions,	)	Judge Nixon
Defendant.	)	

APPENDIX TO DEFENDANT'S RESPONSE TO REQUEST FOR INJUNCTIVE RELIEF

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2. Defendant's Supplemental Response to Petition for Writ of Supersedeas and exhibits thereto, filed in *Sentinel Trust Company, et al. v. Kevin P. Lavender*, Davidson Chancery No. 04-1934-I

3. August 9, 2004 Memorandum and Order Davidson County Circuit Court (sitting by interchange) issued in *Sentinel Trust Company, et al. v. Kevin P. Lavender*, Davidson Chancery No. 04-1934-I

4. Defendant's Response to Motion for Rehearing and exhibits thereto, filed in *Sentinel Trust Company, et al. v. Kevin P. Lavender*, Davidson Chancery No. 04-1934-I

5. September 1, 2004 Order issued by Tennessee Court of Appeals in *Sentinel Trust Company, et al. v. Kevin P. Lavender*, App. No. M2002-02068-COA-R10-CV